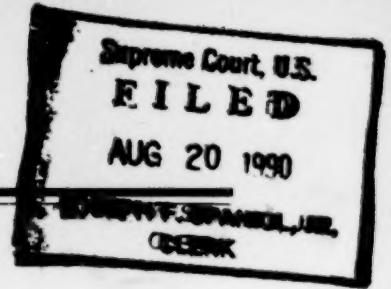


90-5 08

No.



IN THE

Supreme Court of the United States

October Term 1990

CHARLIE SEDILLO, PETITIONER

v.

THE STATE OF NEW MEXICO, RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO
THE NEW MEXICO COURT OF APPEALS**

JOHN VIEBRANZ
P. O. Box 84
Socorro, New Mexico 87801

WINSTON ROBERTS-HOHL
P. O. Box 2463
Santa Fe, New Mexico 87504
(505) 988-9658



QUESTIONS PRESENTED FOR REVIEW:

1. When the jury considering a bribery charge against Petitioner announced that it needed directions on the legality of gifts to public officials, was it consistent with due process to refuse to give the jury the Defendant's tendered instruction on the difference between a gratuity and bribery?
2. When a State gives a Defendant an absolute right to one appeal, is it consistent with due process not to review the testimony when there is a claim of a failure of proof:
 - a. Was there proof of a conspiracy to commit bribery?
 - b. Was there proof of a quid pro quo for some official act of conduct or agreement to act favorable to anyone?

PARTIES TO THE PROCEEDINGS

The only parties to the proceedings are those listed in the caption. Two other defendants were named in the original indictment but this petition is sought only by Charlie Sedillo.

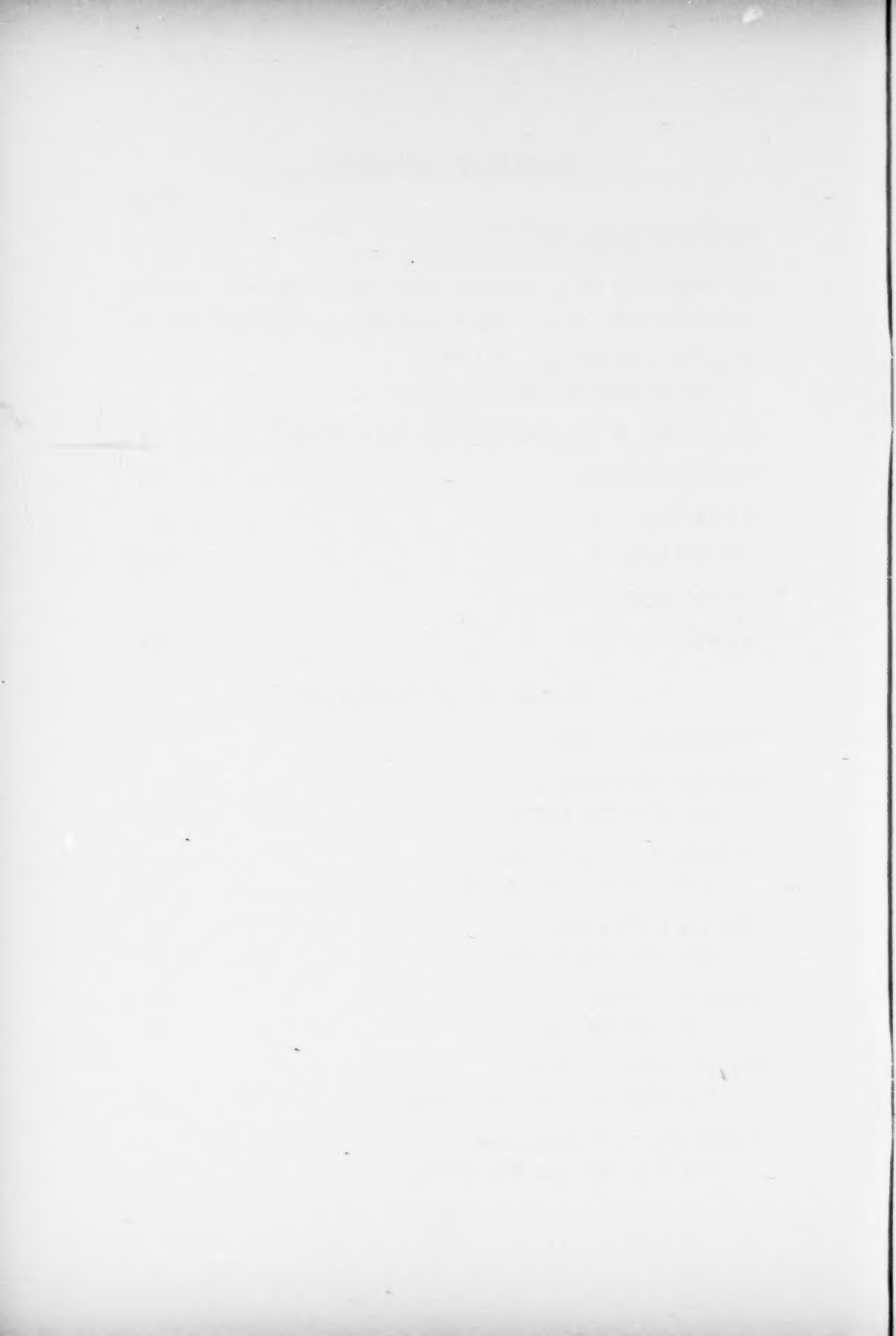
TABLE OF CONTENTS

	Page
OPINION BELOW	5
JURISDICTION	5
CONSTITUTIONAL PROVISIONS INVOLVED ...	6
FACTS MATERIAL TO THE QUESTIONS PRESENTED	7
REASONS FOR GRANTING THE WRIT	11
CONCLUSIONS	14
APPENDIX A	a-1
APPENDIX B	b-1
APPENDIX C	c-1
APPENDIX D	d-1

TABLE OF AUTHORITIES

FEDERAL CASES:

<i>Brown v. Mississippi</i> , 297 U.S. 278 (193)	13
<i>Hamling v. United States</i> , 418 U.S. 87, 125 (1974)	13
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	11, 12
<i>Stone v. Powell</i> , 428 U.S. 465 (1976)	13
<i>United States v. Arthur</i> , 544 F2d 730 (4th Cir. 1976)	12
<i>United States v. Friedman</i> , 813 U.S. 303 (10 Cir. 1987)	12



IN THE
Supreme Court of the United States

October Term 1990

No.

CHARLIE SEDILLO, PETITIONER

v.

THE STATE OF NEW MEXICO, RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO
THE NEW MEXICO COURT OF APPEALS**

Charlie Sedillo petitions for Writ of Certiorari to review the Judgment of the Court of Appeals of the State of New Mexico.

OPINIONS

The opinion of the Court of Appeals for the State of New Mexico will not be reported. It was a memorandum decision which appears in the attached Appendix. (Appendix a-1 to a-2)

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1257(3). New Mexico Court of Appeals issued a Memorandum Opinion on March 27, 1990. The Supreme Court of the State of New Mexico, the State's court of last resort, denied the Petition for Writ of Certiorari seeking review of the Judgment of the Court of Appeals on June 22, 1990. This Petition to the Supreme Court of the United States would be timely if filed by August 20, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

[N]or shall any State deprive any person of liberty or property without due process of law;

Article VI Section 2 of the New Mexico State Constitution reads in pertinent part:

[A]n aggrieved party shall have an absolute right to one appeal.

Section 30-24-2 NMSA 1978 defines receiving of a bribe by a public official as:

Demanding or receiving a bribe by a public officer or public employee consists of any public officer or public employee soliciting or accepting, directly or indirectly, anything of value with intent to have his decision or action, or any question, matter, cause, proceeding or appointment influenced thereby, and which by law is pending or might be brought before him in his official capacity.

FACTS MATERIAL TO THE QUESTIONS PRESENTED

A grand jury in Dona Ana County, New Mexico, charged the Petitioner with one count of conspiracy and one count of receiving a bribe by a public official. The Petitioner was a sheriff in Sierra County, New Mexico. He was convicted of conspiracy and bribery.

Petitioner was elected sheriff of Sierra County, New Mexico, in 1984. In November, 1985, he took a saddle to be repaired and accepted a gift of \$1,000.00 towards the repair of that saddle from the co-defendant who operated a gold mine in Sierra County. The \$1,000.00 was in the form of a check physically delivered by a co-defendant, Thomas Dorris, who was a security officer of the mine owned by the other co-defendant. The testimony was that the operator of the mine wanted to give the sheriff a Christmas gift. He sent his employee, Thomas Dorris, to find out what the Sheriff would like.

All three men were indicted in the same indictment. However, the operator of the mine, who had earlier been convicted of securities fraud, absconded. The Defendants Sedillo and Dorris were tried jointly in Dona Ana County. Count One of the indictment charged all three men with conspiracy to commit bribery of a public official. A second count charged the Petitioner with accepting a bribe to have his decisions influenced. The indictment refers to the appointment of Thomas Dorris as a special deputy as one of the quid pro quo for bribery. The giving of deputy badges to the mine operator and his girlfriend and unspecified prospective favors was another quid pro quo. The State charged that the gift of \$1,000.00 towards the repair of the Petitioner's saddle was done to influence some unspecified conduct that the sheriff could do for the mine and its operator. The evidence at trial was that on

August 20, 1985, Mr. Dorris made an appearance before the Sierra County Commission and sought to be commissioned as a special deputy to work at the gold mine. Mr. Dorris had been a deputy Sheriff for the Petitioner earlier and he knew that in Sierra County there was a special arrangement with a dairy in which the dairy paid the salary for a guard but the guard was commissioned as a regular deputy of the county. Mr. Dorris testified that it was his idea to get a special deputy commission so that he could use the radio frequencies used by the Sheriff's Department to call for help if the need arose when he was chief of security at the mine.

At a County Commission hearing on August 20, 1985, Mr. Dorris told the Commission that he wanted the same type of arrangement that the County had with the dairy. He testified that his employer was willing to pay for the costs of hiring and the buying of equipment including a patrol car for the Special Deputy. The Commission advised him that before any action could be taken the request had to be placed in writing.

At the next regular County Commission meeting in September, 1985, Mr. Dorris appeared and presented the request from his employer. After lengthy discussion, the County Commission moved and passed the resolution to have Mr. Dorris made a special deputy under the direction of the sheriff's department. The Commission then asked its counsel to see whether a valid contract could be executed and whether there was any impropriety with the arrangements.

Thereafter the commission instructed Mr. Dorris to draw up the contract and to present it to the Commission at its next meeting. The next meeting was on September 23, 1985, at which time Mr. Dorris was told that the appointment of the special deputy had to be turned over

to Petitioner's department and the Petitioner as sheriff would get together with him and his employer and come to some agreement so that the arrangement could be accomplished without any exposure of liability to the County.

At a subsequent commission meeting on October 21, 1985, the Commission was told that the mine would be responsible for salary and insurance and all benefits of the Special Deputy and that the owner of the mine would reimburse the County for all business expenses incurred. At the next meeting, the Petitioner, as sheriff of Sierra County, came and told the Commission he had no objection to the arrangement.

Subsequently the Petitioner hired Mr. Dorris as a special deputy and had him work on an emergency basis until the position was advertised.

It is significant that the position of the prosecution was that the owner of the mine wanted a deputy appointed so that anyone coming to the mine would be impressed with the official capacity of its security officer. The appointment of Mr. Dorris himself as a special deputy was not a critical fact because anyone would have satisfied the theory upon which the State proceeded to prosecute the Petitioner.

Another claim of special favor was that official badges were given to the operator of the mine and his girlfriend by the Sheriff's Department. However, the testimony was that several different types of badges were customarily given to various individuals by different Sheriff's Departments throughout the State of New Mexico. The position of the State was that the badges were given to the operator and his girlfriend to lend an air of authority to the operations of the mine and thus aided the operator in defrauding investors.

A third claim of favor was the after-the-fact release

of the son of the operator of the mine, allegedly without bond, after an extradition warrant on two felonies from the State of California was received in Sierra County. The testimony, however, was contrary and showed that the son was bonded out by regular bondsman and eventually he went to California. A bondsman testified that he wrote the bond for the son and there was nothing wrong or unusual with the release. The jailer who released the son likewise testified that the release was conducted according to normal procedures.

Over all, it is significant that there were no specific acts agreed upon at the time the alleged bribery was accepted. The State's position was of some unspecified act the sheriff could do for the mine in the future.

At trial, the Defendant tendered instructions requiring the jury to be informed of the difference between a bribe and a gift, and between the intent of the bribe-giver and the receiver of the gift. The position of the defense was that because the operator of the mine was a criminal, it was necessary for the jury to understand that the operator could be convicted but that the sheriff need not be. These instructions were rejected.

The defense also claimed that there was a failure of proof of conspiracy. Throughout the trial the prosecution attempted to introduce hearsay statements claiming that such statements were in furtherance of the conspiracy. Each time, the trial judge ruled that there was no showing of a conspiracy. However, at the close of the trial, the court would not dismiss the conspiracy count. The jury subsequently convicted him of conspiracy.

After the jury had begun deliberations, it sent out a note to the trial judge asking the Court what was the law with respect to gifts to an official in public office. The jury wanted to know whether officials could receive gifts, and

whether there was a limit on the amount of such gifts. The defense at this juncture re-argued its position and insisted that the instructions on the difference between a gift and a bribe be given. The Court refused to give the tendered instructions. The jury convicted the Defendant of bribery.

After conviction and sentence, Petitioner appealed to the New Mexico Court of Appeals following the local procedure. The Court of Appeals assigned the case to a summary calendar with affirmance proposed. Defendant argued that the Court could not give him a meaningful review of his conviction unless it reviewed the testimony. The Court of Appeals refused to consider the testimony and issued an opinion affirming the convictions of the Defendant. The Defendant sought discretionary review in the New Mexico Supreme Court, the State's court of last resort, but that Petition was denied.

The Petitioner raised the issue of failure of proof and lack of necessary instruction at the trial court level by tendering proper instructions and moving for a directed verdict. In the appellate Court, Petitioner urged that failure of proof violated his federal constitutional rights, and that the abbreviated review denied him federal due process.

REASONS FOR GRANTING THE WRIT

First, the Petitioner contends that it is a violation of his due process right under the Fourteenth Amendment to be convicted of an act when there is a failure of proof. In *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court declared that the evidence has to be sufficient to justify a rational trier of fact to find guilt beyond a reasonable doubt with respect to every element of the charge. This was not satisfied in this case. In addition, *Jackson*

v. Virginia is especially instructive because that decision assumed that a jury is properly instructed. However, in Petitioner's case, the jury was not adequately instructed. The jury itself asked for clarification whether a public official in New Mexico may properly receive a gift; it never received an answer to its request.

The decision of the New Mexico Supreme Court likewise conflicts with several decisions in the different circuits regarding gifts and bribery. In *United States vs. Friedman*, 813 F2d 303, (10th Cir. 1987), that circuit explained that the illegal gratuity statute, in contradistinction to a bribery statute, merely requires that an official accept something to which he is not entitled. No corrupt intent is intended. However, New Mexico does not have an illegal gratuity statute, although it had a bribery statute. See *Section 30-24-2*, NMSA *supra*. Likewise, in the Fourth Circuit *United States vs. Arthur*, 544 F2d 730 explains:

"The crucial distinction between "goodwill" expenditure and bribery is, then, the existence or non-existence of criminal intent that the benefit to be received by the official is a quid pro quo for some official act, pattern of fact, or agreement to act favorably to the donor when necessary. 544 F2d at 735."

Petitioner urges that a conviction based on improper instructions is a violation of due process. The Petitioner submitted instructions that would distinguish between goodwill gifts to officials which do not amount to bribery. See *United States vs. Arthur*, 544 F2d 730, (4th Cir. 1976). The unswerving rule is that the Defendant is entitled to have the Jury instructed, and that guidance on the question of law be given when there is evidence in support. However, in this case, this was not done.

Furthermore, the jury itself came back and specifically asked for guidance to distinguish between gifts and bribery, and this was not done. We respectfully urge that this failure to instruct the jury constituted a violation of due process and the conviction violates due process and should be set aside.

Third, the Petitioner respectfully urges that the Petition should be granted to review the nature of the right to appeal afforded him by the State of New Mexico. The Petitioner is not claiming a federal right to appeal. However, the Petitioner urges that once that right has been afforded him, it must be done in a manner consistent with due process. *Brown v. Mississippi*, 297 U.S. 278 (1936):

The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing, it "offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (297 U.S. @285)

In *Hamling v. United States*, 418 U.S. 87, 125 (1974), this Court recognized that the primary responsibility for reviewing the sufficiency of the evidence lies with the Court of Appeals. However, under the procedure used in Petitioner's case, the reviewing Court simply abandoned that responsibility. Because the appellate process is part and parcel of the process controlling the freedom of Petitioner, the abbreviated review by the New Mexico Court of Appeals denied the Petitioner due process of law. See *Stone v. Powell*, 428 U.S. 465 (1976), in which this Court recognized that state Courts have a constitutional obligation to uphold federal law. This Court has held that, in the federal system, a Court of Appeals has a duty to review the sufficiency of the evidence on review. In this

case, because the New Mexico Intermediate Appellate Court refused to have a transcript brought up to consider the testimony below, we submit that, when there was a claim of failure of proof on appeal, it could not meaningfully conduct a review. For this reason alone, we respectfully urge that the Writ be issued.

CONCLUSION

Because New Mexico does not have a statute prohibiting illegal gratuity, there must have been proof of a quid pro quo and a corrupt intent for proof of bribery. Because there was no showing of a conspiracy, there was a failure of proof as to conspiracy and bribery. Secondly, because the Constitution of New Mexico grants the Petitioner an absolute right to one appeal, the perfunctory nature of the review done by the New Mexico Court of Appeals violates due process.

Based on the foregoing, the Petitioner respectfully prays that the Writ be issued.

Respectfully Submitted:

JOHN VIEBRANZ

P. O. Box 84

Socorro, New Mexico 87801

by:

Winston Roberts-Hohl

P. O. Box 2463

Santa Fe, NM 87504

(505) 988-9658

Attorneys for Petitioner

APPENDIX A

**IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO**

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. -

March 27, 1990

No. 11,969

CHARLIE SEDILLO,

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT
OF DONA ANA COUNTY**

ROBERT A. DOUGHTY, District Judge

JOHN VIEBRANZ

Socorro, New Mexico

WINSTON ROBERTS-HOHL

Santa Fe, New Mexico

Attorneys for Defendant-Appellant

HAL STRATTON, Attorney General

Santa Fe, New Mexico

Attorney for Plaintiff-Appellee

MEMORANDUM OPINION

HARTZ, Judge.

Defendant appeals his convictions for accepting a bribe and conspiracy. Our first and second calendar notices proposed summary affirmance of defendant's convictions. Defendant has filed a memorandum in opposition pursuant to an extension granted by this court. Defendant does

not address Issues D, F, G, H, and I in his memorandum in opposition. Those issues are therefore deemed abandoned. *See State v. Martinez*, 97 N.M. 585, 642 P.2d 188 (Ct. App. 1982). We have considered the arguments that defendant has made in his memorandum in opposition. Those arguments do not persuade us that affirmance would be improper.

Defendant continues to argue that the evidence was insufficient. The discussion in our first calendar notice, however, shows the contrary. The jury, not this court, is the finder of fact; we do not reweigh the evidence. *See State v. Lankford*, 92 N.M. 1, 582 P.2d 378 (1978).

Defendant also complains about the trial court's instruction on bribery. Yet the instruction accurately stated the elements of the offense, including the requisite intent. There was no need for an additional instruction on intent, even after the jury sent out a note inquiring about gifts to public officials.

For these reasons and reasons stated in the calendar notices, we affirm defendant's convictions. *See State v. Sisneros*, 98 N.M. 201, 647 P.2d 403 (1982).

IT IS SO ORDERED.

HARRIS L. HARTZ, Judge

WE CONCUR:

THOMAS A. DONNELLY, Judge

PAMELA B. MINZNER, Judge

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

CHARLIE SEDILLO,

Defendant-Appellant.

Jan. 25, 1990

No. 11,969

CALENDAR NOTICE

NO. 11,969, *State v. Charlie Sedillo, et al.*

You are hereby notified that the:

Record Proper

was filed in the above-entitled cause on January 2, 1990.

This case has been assigned to the

SUMMARY CALENDAR.

Summary affirmance is proposed.

Initially, we note defendant has failed to inform this court in his docketing statement of how he preserved at trial Issues G and H that he now raises on appeal, in violation of SCRA 1986, 12-208(B)(4). In order to preserve an issue for appeal, a specific objection alerting the trial court to the claimed error is required below. *State v. Lopez*, 84 N.M. 805, 508 P.2d 1292 (1973); *see also* SCRA 1986, 12-216. Accordingly, we will not address Issues G and H.

We note that appellant's counsel has failed to comply fully with SCRA 1986, 12-202(D) and -307, in that all parties were not served with the notice of appeal as required by the appellate rules. Defense counsel is reminded to follow all appellate rules more closely in the future.

Issue A: There was substantial evidence to support a conviction of accepting a bribe. Demanding or receiving a bribe by a public officer or public employee consists of any public officer or public employee soliciting or accepting, directly or indirectly, anything or value, with intent to have his decision or action on any question, matter, cause, proceeding or appointment influenced thereby, and which by law is pending or might be brought before him in his official capacity. NMSA 1978, §30-24-2 (Repl. Pamp. 1984).

The indictment (R.P. 11) states that the specific appointment of Dorris as deputy sheriff was one appointment included under the charge of demanding or receiving a bribe by a public officer. According to the docketing statement, there was testimony that defendant accepted a favor valued at \$1,000.00 indirectly or directly from Barbara. After the acceptance of the favor, Dorris was appointed by defendant as special deputy to protect Barbara's mine.

There was testimony that defendant gave badges to Barbara and his girlfriend. In the docketing statement and in the record, there is evidence that Barbara's son was bonded out on a surety bond contrary to the wishes of the magistrate judge (R.P. 182), and that defendant attempted to hide the arrest warrants of Barbara's son. The statutory definition for bribery includes action on any appointment which by law might be brought before any public officer in his official capacity. See §30-24-2. Defendant was aware that the appointment of a special deputy to guard Barbara's mine might be brought before him while he was acting as sheriff, and that Barbara desired the appointment to be made to Dorris. This is supported by the fact that his opinion was sought by the county commission on the possibility of special deputy

arrangements, and that Barbara expressed a desire at the commission hearing to hire Dorris. This is sufficient evidence to support the conviction. *See State v. Brown*, 100 N.M. 726, 676 P.2d 253 (1984).

Issue B: Conspiracy may be established by circumstantial evidence, the agreement being a matter of inference from fact and circumstances as a whole showing the parties united to accomplish a scheme. *State v. Ross*, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974). The circumstances of the trip to Las Cruces, the appointment of Dorris, the favorable conduct toward Barbara, and the discussions with the county commission, are substantial evidence to support the conspiracy conviction. *See id.*

The crimes of conspiracy and acceptance of a bribe are separate crimes requiring different elements for conviction. *See* NMSA 1978, §30-24-2 and §30-28-2 (Repl. Pamp. 1984). Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state. §30-28-2. Receiving a bribe consists of any public officer soliciting or accepting, directly or indirectly, anything of value, with intent to have his action on any matter influenced thereby, and which by law is pending or might be brought before him in his official capacity. *See* §30-24-2.

Conspiracy involves a mutually implied understanding which may or may not exist in the crime of bribery. *See State v. Smith*, 102 N.M. 512, 697 P.2d 512 (Ct. App. 1985). Under *Smith*, an agreement by two persons to commit a particular crime is precluded from being prosecuted as a conspiracy when the particular crime is such that it necessarily requires the participation of two persons for its commission. This rule is only applicable when

the parties to the agreement are the only persons who participate in the crime, the immediate consequences rest only on the participants, and when the agreement is not the sort of threat to society protected by the conspiracy law. *Id.* That rule does not apply where, as in this case, defendant was convicted of conspiracy with two other persons. Here, conspiracy is not a necessarily included offense of accepting a bribe and defendant was not placed in double jeopardy. *See id.*

Issue C and E: It is not apparent from defendant's docketing statement which instruction he refers to in Issue C. Insofar as defendant complains about the denial of any of his requested instructions, there was no error by the trial court. The trial court is not to single out certain elements for extensive commentary. *State v. Torres*, 99 N.M. 345, 657 P.2d 1194 (Ct. App. 1983). Argument and explanation are left to counsel. *Id.* Under the policy of the criminal Uniform Jury Instructions, instructions are not to be repetitious and superfluous, and negatives should not be expressed. *Id.* The jury instruction on bribery given by the court (R.P. 287) tracked the language of the statute. NMSA 1978, §30-24-2 (Repl. Pamp. 1984). The instructions given by the trial judge adequately covered the law applicable to this case.

Issue D: Defendant was not convicted of aiding and abetting. In addition, the record does not indicate that defendant requested a limiting instruction on aiding and abetting. There was evidence at trial to show that Dorris aided and abetted Barbara, making the instruction necessary in regard to the co-defendants. (D.S. 7) Moreover, defendant has not shown how he has been prejudiced by the trial court's instruction.

Issue F: Trial counsel has a duty to avoid a conflict of interest. *State v. Talley*, 103 N.M. 33, 702 P.2d 353 (Ct. App. 1985). There must be an actual conflict and not just a possibility of conflict, and defendant must show that his counsel actively represented conflicting interests. *State v. Robinson*, 99 N.M. 674, 662 P.2d 1341 (1983). Counsel for the prosecution did not represent conflicting interests in that the Sierra County Commission is not a party in this case and counsel owed no conflicting duty to the commission. *See id.*

Issue I: Defendant must show that he suffered actual prejudice due to preindictment delay. *State v. Duran*, 91 N.M. 756, 581 P.2d 19 (1978). Defendant has not shown that the lost witness would have testified or that his testimony would have been useful in this case. Defendant has failed to establish how his defense would have been more successful if the lost witness had been available and willing to testify. *See id.* Courts are not concerned with reason for preindictment delay when defendant has not shown that he was actually prejudiced by the delay. *Id.* Nevertheless, the record indicates that the delay complained of by defendant has been explained by the state. (R.P. 111-114)

s/Harris L. Hartz
JUDGE

APPENDIX C

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

CHARLIE SEDILLO,

Defendant-Appellant.

Feb. 21, 1990

No. 11,969

SECOND CALENDAR NOTICE

NO. 11,969, *State v. Charlie Sedillo*

You are hereby notified that the:

**Defendant-Appellant's Memorandum in Opposition to
Proposed Summary Affirmance**

was filed in the above-entitled cause on February 7,
1990.

This case remains assigned to the *SUMMARY
CALENDAR*

Summary affirmance is again proposed.

Issues A and B: On review of the sufficiency of the evidence, evidence must be viewed in the light most favorable to the jury's verdict, and all reasonable inferences must be allowed in support of the verdict. *State v. Brown*, 100-N.M. 726, 676 P.2d 253 (1984). The testimony referred to in the first calendar notice was sufficient to enable the jury to find that the defendant committed the offense charged. Defendant cites *Lopez v. State*, 107 N.M. 450, 760 P.2d 142 (1988), in his memorandum in opposition. In *Lopez*, there were not enough facts in the docketing

statement to allow a review of the evidence. In this case, there were enough facts provided to allow this court to review the issues on sufficiency of the evidence. We do not find defendant's argument persuasive on these issues. For these reasons and the reasons stated in the first calendar notice, we propose to find that there was sufficient evidence to support the convictions.

Issues C and E: Defendant continues to argue that his requested instruction in regard to gifts to public officials should have been given to the jury. It appears that the jury asked the question about gifts to officials after hearing the argument of defense counsel. (D.S. at 9) In his memorandum in opposition, defendant cites *State v. Buhr*, 82 N.M. 371, 482 P.2d 74 (Ct. App. 1971), for the proposition that when a jury is confused, there is a violation of due process. The jury in *Buhr* was given an instruction which was confusing in that it included the idea of premeditation but later stated that premeditation was not required to find that second degree murder was committed. Contrary to *Buhr*, the instructions given in this case were not confusing instructions.

The defendant argues, in his memorandum in opposition, that he is entitled to an instruction according to the theory of his case, and that the trial court is obliged to formulate an instruction when there is no approved instruction covering the issue. The case cited by defendant to support this claim holds that a jury instruction which deprives a defendant of a defense available according to law at the time of his act is prohibited. *See State v. Norush*, 97 N.M. 660, 642 P.2d 1119 (Ct. App. 1982). Here, however, defendant was not deprived of an available defense. The instructions properly stated the elements of each offense.

Issue G: Fair argument based on the evidence is not improper argument by a prosecutor during closing argument. The prosecutor in this case argued that the sheriff appointed deputies. According to the docketing statement, there was evidence to show that the Sierra County Commission approved the appointment and the sheriff actually made the appointment. (D.S. at 3-4); *See* NMSA 1978, §4-41-5 (Repl. Pamp. 1984) (the sheriffs of this state shall have power to appoint deputies). For these reasons, we propose to find that the argument by the prosecutor was based on the evidence and not improper. *Id.* We pointed out in the first calendar notice that the prosecutor owed no conflicting duty to the commission. Defendant has still failed to establish that a conflicting duty existed. Also, we fail to comprehend how the prosecutor presented his personal beliefs to the jury.

Issues F and I: Defendant's memorandum in opposition fails to point out any errors in fact or law in the proposed affirmance of these issues. We therefore propose to affirm on these issues for the reasons stated in the first calendar notice. *See State v. Sisneros*, 98 N.M. 201, 647 P.2d 403 (1982)

Issue H: Defendant does not address this issue in his memorandum in opposition, therefore, it is deemed abandoned. *See State v. Martinez*, 97 N.M. 585, 642 P.2d 188 (Ct. App. 1982)

s/Harris L. Hartz
JUDGE

APPENDIX D
IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Tuesday, May 22, 1990

CHARLIE SEDILLO,

Petitioner,

vs.

No. 19,165

STATE OF NEW MEXICO,

Respondent.

This matter coming on for consideration by the court upon Petition for Writ of Certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Petition for writ of certiorari is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 11969 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: **A True Copy**

ROSE MARIE ALDERETE
CLERK OF THE SUPREME COURT

By s/ Jane Gurule
Deputy